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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 83/2017 concerning Mahmoud Hussein Gommaa Ali (Egypt)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 13 June 2017, the Working Group transmitted to the Government of Egypt a communication concerning Mahmoud Hussein Gommaa Ali. The Government replied to the communication on 8 August 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mahmoud Hussein Gommaa Ali is an Egyptian national, born on 12 December 1966. He is a prominent journalist. Before his arrest, Mr. Hussein had been news editor at Al-Jazeera Arabic in Doha, where he resided.

Background

5. According to the source, a number of political and legal measures implemented by the Egyptian authorities in the past few years have severely constrained the rights of citizens and civil society in Egypt. This includes measures leading to a crackdown on journalists and all forms of independent reporting, criticism and dissent.

6. Since 2011, 10 journalists have reportedly been killed, without proper investigations being conducted. The source notes that Egypt ranks third in the world in terms of the number of journalists incarcerated, with 24 journalists in detention in the country. Journalists, especially those working for Al-Jazeera, have been consistently accused by the Government of inciting sedition and spreading false news. Since 2013, the Government has accused Al-Jazeera of supporting the Muslim Brotherhood, an organization outlawed by the Government as a "terrorist" organization. The company has been banned from operating in Egypt.

7. The source submits that the Terrorist Entities Law (2014) and the Counter-Terrorism Law (2015) set forth vague definitions for "terrorism" and have been used increasingly to try critics as terrorists and to implement exceptional measures, including the extension of pretrial detention, the monitoring of private telephone calls and the designation of certain criminal courts to hear terrorism cases. In addition, those laws have made it a crime to publish news about terrorism that contradict the Government's version of events and have enabled the courts temporarily to ban journalists from practising, with infringements punishable by up to two years in prison. Moreover, a state of emergency was declared in Egypt in March 2017, giving even broader powers to the Government. The source claims that the Government has been using pretrial detention frequently as a punitive measure against political prisoners and prisoners of conscience.

Arrest and detention

8. According to the source, Mr. Hussein joined the Cairo bureau of Al-Jazeera Arabic at the end of 2010. The bureau was shut down by the Egyptian authorities in mid-2013. As a result, Mr. Hussein moved to Doha in the third quarter of 2013 to continue his work for Al-Jazeera and was in charge of covering news related to the European Union. Mr. Hussein still frequently visited Egypt for personal reasons as members of his family, including his two wives and nine children, still resided there.

9. The source submits that, on 19 December 2016, Mr. Hussein was stopped, questioned and detained at Cairo Airport upon arrival there to visit his family. His passport was confiscated, and he was questioned for more than 15 hours, including about the nature of his work with the Al-Jazeera media network and Al-Jazeera's intentions in covering Egypt. The source notes that, from the time Mr. Hussein moved to Qatar in 2013, Al-Jazeera had not sent him to Egypt on business. During the course of the interrogation, Mr. Hussein was not allowed to contact anyone, including his lawyer. He was then released and asked to retrieve his passport from the police at a later date.

10. The source reports that, on 22 December 2016, Mr. Hussein was arbitrarily arrested outside his home in Giza, as he was leaving to go to the police station to collect his passport. According to the source, the arresting officers — presumably Homeland Security agents — did not show him an arrest warrant or any other official documents. The group of officials that conducted the arrest was particularly large, including multiple police cars. Some officers wore uniforms, while others did not. Mr. Hussein was held for over 12 hours without his family's knowledge. The same day, at around 11 p.m., police officers reportedly raided the homes of Mr. Hussein's father, brothers and sisters.

11. According to the source, after detaining Mr. Hussein for over 12 hours, the Homeland Security agents took him — handcuffed — to his sister's house and forced him to record a series of "confession" videos, all allegedly made under coercion and severe duress. Mr. Hussein's family was not allowed to speak to him, and he was then taken away from his sister's house without being given any details as to where he was going, why he was being detained or which authority had ordered his detention.

12. On 23 December 2016, the authorities officially registered the arrest of Mr. Hussein. He was then reportedly held incommunicado in an undisclosed location until 5 January 2017.

13. The source notes that, on 25 December 2016, three videos showing Mr. Hussein's forced "confessions" were published or leaked online by the Egyptian authorities. The "confessions" sought to demonstrate that Mr. Hussein had been arrested because of his association with the Al-Jazeera documentary "Al-Asaker", which was first aired on 27 November 2016. The documentary covered the issue of conscription in the Egyptian army and the alleged mistreatment and exploitation of soldiers. In the first video, Mr. Hussein expresses his disapproval of the documentary and states that, as an Egyptian, he had expressed his objection to the management of Al-Jazeera. The media network subsequently clarified that Mr. Hussein had never worked on the documentary in any capacity. In the second forced "confession" video, Mr. Hussein is seen standing over media equipment displayed on a table, explaining that he had been asked to keep it with him for safe keeping following the 2013 events that lead to the attack on and fire at Al-Jazeera's Cairo office. In one of the videos, the narrator claims that the tapes on display contain evidence against Mr. Hussein. According to the source, Mr. Hussein was coerced to repeat his forced "confessions" around 20 times.

14. On 25 December 2016, the Ministry of the Interior issued a statement on its Facebook page announcing the arrest of Mr. Hussein.

15. On 24, 25 and 27 December 2016, the authorities reportedly interrogated Mr. Hussein without the presence of his attorney. According to the source, during each of the interrogations, Mr. Hussein was asked about his involvement in the documentary "Al-Asaker". He repeatedly informed his interrogators that he had not been involved in the documentary since he covered news in the European Union and not Egypt.

16. On 29 December 2016, Mr. Hussein's lawyer filed three applications with the Public Prosecution Office. The first application included a request that Mr. Hussein's lawyer be notified of any interrogation sessions or of any renewal sessions, as required by article 124 of the Criminal Procedure Code. In the second, his lawyer sought approval to review the case files, as required by article 125 of the Code. The third included an application that visitation rights be granted to Mr. Hussein's daughter. Each of the requests was reportedly unanswered.

17. On 4 January 2017, Mr. Hussein appeared before the Homeland Security Prosecution, which issued an order to detain him for 15 days pending investigation. On 18 January 2017, that order was renewed for another 15 days.

18. On 4 and 9 January 2017, Mr. Hussein's lawyer applied for official visitation rights to the Attorney General of the Homeland Security Prosecution. The source reports that both applications were unanswered.

19. According to the source, while Mr. Hussein has not yet been formally charged, the Minister of the Interior has been quoted in the press accusing Mr. Hussein of: incitement against State institutions; broadcasting false news with the aim of spreading chaos; using several residences to avoid security monitoring in the light of Al-Jazeera's unauthorized work; being a member of an illegal organization; and receiving monetary funds from foreign authorities in order to defame the State's reputation.

20. On 5 January 2017, it was confirmed for the first time since the beginning of his detention that Mr. Hussein was being held in the Tora prison.

21. On 10 January 2017, Mr. Hussein's lawyer filed a complaint with the Attorney General, stating that he had not been allowed to visit his client or review the case files, despite having made several applications. That complaint was referred to the Homeland Security Prosecution. The source reports that, at the date of submission of the present communication,

the complaint remained unanswered. On 29 January 2017, Mr. Hussein's family was finally granted the official right to visit him once a week. On 1 February 2017, Mr. Hussein was referred to the Giza Felonies Court, which renewed his detention order, initially for four days and then for two further periods of 45 days each.

22. On 21 March 2017, Mr. Hussein was finally released from solitary confinement after 89 days. According to the source, while in solitary confinement, Mr. Hussein was kept in a small, dark cell infested with insects, with no electricity, no ventilation and a terrible smell. Mr. Hussein was only allowed to urinate into a plastic bowl inside his cell. The source also claims that the prison authorities denied Mr. Hussein access to winter clothes, despite the very cold weather and the fact that the cell was not heated. The source further reports that Mr. Hussein was only allowed out of his cell on very rare occasions, sometimes after as much as a week. Mr. Hussein did not have access to sunlight and was reportedly forced to have his head shaved. He was allegedly constantly mistreated and denied adequate food. As a result, he lost a significant amount of weight. Mr. Hussein developed rashes from the contaminated environment of his cell and complained of chest pains. To date, he reportedly continues to suffer from shortness of breath and remains under severe physical and psychological stress.

23. On 21 March 2017, Mr. Hussein was moved to a cell within the general prison population, where he currently remains. According to the source, Mr. Hussein is being held in a cell with three other inmates, all accused or convicted of crimes such as murder. He is not allowed to interact with other political prisoners.

24. The source reports that, on 19 April 2017, Mr. Hussein's lawyer was finally allowed to visit his client at the Cairo Prison. This was the first time that the lawyer was able to discuss the case with his client. However, the visit was brief and held in the presence of the prison warden.

25. On 26 April 2017, the lawyer submitted a request to the Public Prosecutor to have access to copies of the case files. The source reports that, at the date of submission of the present communication, his application remained unanswered.

26. On 29 April 2017, Mr. Hussein's detention order was once again renewed for 45 days. His lawyer appealed that decision and, for the first time, the appeal was accepted for review by the court. However, the source reports that none of Mr. Hussein's attorneys received notification that the court had accepted the appeal. Mr. Hussein was taken to court on 16 May 2017 to review the merits of his appeal but without the presence of his lawyers. He was asked by the Public Prosecution to plead his case himself. The source notes that, regrettably, Mr. Hussein did not ask for his lawyer to be called upon and voluntarily accepted to speak before the judge. The appeal was rejected and, at the date of submission of the present communication, Mr. Hussein's lawyer was in the process of filing a complaint regarding that process.

27. According to the source, two of Mr. Hussein's brothers were also arrested on 22 December 2016, detained and questioned. Both brothers worked in the media sector in Egypt for media groups unrelated to Al-Jazeera. On 2 January 2017, they were released from custody without being formally charged. However, the source reports that, while in custody, they were mistreated by the authorities, stripped naked and searched invasively. When their detention was over, they were reportedly blindfolded, put into a car and released in the middle of a street in the 6 October area of Cairo. The source further notes that, on 22 December 2016, the police raided the homes of Mr. Hussein's brothers and destroyed some of their belongings. Mr. Hussein's home in Cairo and that of his sister were also raided and unlawfully searched by the authorities. His sister's home was reportedly raided by police officers who had come in armed vehicles. The source notes that the police did not present any warrant. Mr. Hussein's sister was at home with her 12-year-old son at the time of the raid on her home, and at one point the authorities allegedly pointed a gun at him. Finally, the source reports that one of Mr. Hussein's wives was suspended from her job at the Egyptian State television company.

28. The source submits that the detention of Mr. Hussein is arbitrary under categories I, II, III and V of the categories applicable to the cases under consideration by the Working Group.

Category I

Violation of domestic regulations on pretrial detention

29. According to the source, there is no legal basis in Egyptian law for Mr. Hussein's continued pretrial detention. Under the Egyptian Criminal Procedure Code, pretrial detention is an exceptional legal measure available only in the following cases: for cases of in flagrante delicto offences; when the accused is a flight risk; when there is a fear that the legal process may be impeded or harmed; in cases implicating security and public order; and in cases involving felony or misdemeanour crimes punishable by a prison sentence, when the accused does not have a known residence in Egypt. The source submits that the pretrial detention of Mr. Hussein does not satisfy any of those five categories.

Pretrial detention in Egypt violates domestic and international human rights obligations

30. In any case, the source considers that the provisions of the Criminal Procedure Code on pretrial detention, which have been used to uphold the continued detention of Mr. Hussein, violate human rights protections enshrined in both domestic and international law and cannot serve as a basis to continue keeping him in detention.

31. According to the source, those provisions are vague and subject to excessive discretion, facilitate pretrial detention for an egregiously lengthy period of up to two years and leave little or no recourse for detainees who wish to challenge their continued detention, in violation of articles 9, 10 and 11 of the Covenant; article 6 of the African Charter on Human and Peoples' Rights; and article 54 of the Constitution of Egypt.

Informal charges against Mr. Hussein are without merit

32. Formal charges have not yet been brought against Mr. Hussein. However, the source submits that the informal accusations made by the Government against him are without merit and may not constitute a valid basis on which to keep him in pretrial detention. The source highlights that the authorities have failed to produce a single piece of evidence against Mr. Hussein that could justify any of the charges informally brought against him.

33. For the reasons above, the source submits that the detention of Mr. Hussein is arbitrary under category I.

Category II

34. According to the source, the detention of Mr. Hussein is also arbitrary under category II because his detention resulted from the exercise of his fundamental rights to freedom of opinion and expression and his right to freedom of association.

35. In an interview in March 2016, Mr. Hussein said that freedom of expression was valuable to him and that he had cherished that principle throughout his career. He said that, at Al-Jazeera, he had never been asked either to change or stop anything he had written or reported, or to say anything in particular. Moreover, he felt that it was by always seeking accurate information and news that Al-Jazeera had earned its credibility in the world.

36. According to the source, by working for Al-Jazeera in Qatar as a prominent journalist, Mr. Hussein was exercising his rights to freedom of expression and freedom of association. The source recalls the pattern of abuse by the Egyptian authorities against Al-Jazeera journalists.

37. The source submits that Mr. Hussein was arrested, physically mistreated, held in solitary confinement and arbitrarily detained simply for exercising his fundamental rights to freedom of expression and freedom of association, in violation of articles 19 (1) and (2) and 22 (1) of the Covenant; articles 19 and 20 (1) of the Universal Declaration of Human Rights; and articles 65 and 75 of the Constitution. The source recalls that the Human Rights Committee has stated in its general comment No. 34 (2011) on the freedoms of opinion and expression that the right to freedom of expression includes the right to express a dissenting political opinion. The source further states that the exercise by Mr. Hussein of his rights to freedom of expression and freedom of association does not fall under any of the permissible limitations set forth by the Covenant.

Category III

38. According to the source, the detention of Mr. Hussein is arbitrary under category III for the following reasons:

(a) Mr. Hussein was detained without a judicial order, in violation of article 9 (1) of the Covenant, principles 2 and 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 54 of the Constitution;

(b) The authorities failed to inform Mr. Hussein of the charges against him, in violation of articles 9 (2) and 14 (3) (a) of the Covenant, principles 10 and 13 of the Body of Principles and article 54 of the Constitution;

(c) The authorities failed to bring Mr. Hussein promptly before a judge and to try him without undue delay, in violation of articles 9 (3) and 14 (3) (c) of the Covenant and principle 11 (1) of the Body of Principles. The source recalls that, upon his arrest on 22 December 2016, Mr. Hussein was held in an unknown location until 5 January 2017. During that period, he was not brought before a judge;

(d) The authorities failed to grant Mr. Hussein the opportunity to appeal the lawfulness of his detention, in violation of article 9 (4) of the Covenant, principle 11 (3) of the Body of Principles and article 54 of the Constitution. Although Mr. Hussein was brought before a court for regular pretrial detention renewal sessions, the source notes that neither he nor his legal representative were granted a proper opportunity to be heard and to make a case for conditional release and/or bail. Furthermore, the authorities failed to provide any documentation or evidence regarding the informal accusations or potential pending charges against Mr. Hussein, denying him an opportunity to become fully aware of the reasons for his detention and, ultimately, to appeal the status of his detention. According to the source, the near automatic nature of the detention renewals — despite the fact that none of the five guidelines set forth under Egyptian law for pretrial detention had been established by the prosecution or the court — demonstrates that Mr. Hussein has been denied an actual and realistic opportunity to appeal the lawfulness of his detention;

(e) The authorities violated the right of Mr. Hussein to be presumed innocent until proven guilty, in violation of article 14 (2) of the Covenant, article 11 (1) of the Universal Declaration of Human Rights, principle 36 of the Body of Principles and article 96 of the Constitution. The source recalls paragraph 7 of Human Rights Committee general comment No. 13 (1984) on the administration of justice, in which the Committee states that the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. The source submits that, by placing Mr. Hussein in pretrial detention, continuously renewing his detention in a near-automatic manner and not giving proper due process consideration to his conditional release and/or granting of bail, the authorities have acted under the assumption that Mr. Hussein is guilty and treated him as such. Furthermore, the source highlights that government-controlled media outlets have engaged in a smear campaign against Mr. Hussein, portraying him as guilty without an opportunity to first be presumed innocent. Moreover, the source submits that, by placing Mr. Hussein in the Tora prison, a detention centre where convicted criminals serve their sentences, Egyptian authorities have treated Mr. Hussein as guilty before charging him, in violation of article 10 (2) (a) of the Covenant and principle 8 of the Body of Principles;

(f) The authorities violated the right of Mr. Hussein to have access to a lawyer as well as adequate time and facilities for the preparation of his defence, in violation of article 14 (3) (b) of the Covenant. The source recalls that, in paragraph 9 of its general comment No. 13, the Human Rights Committee states that facilities must include access to documents and other evidence that the accused requires to prepare his or her case. The source recalls that Mr. Hussein's lawyer was only able to meet his client for the first time on 19 April 2017, almost four months after his arrest. Moreover, the source claims that the prosecution has failed to provide Mr. Hussein's counsel with the case files or to provide any documentation from the case to substantiate the informal allegations or potential pending charges against Mr. Hussein;

(g) The authorities violated the right of Mr. Hussein to be equal before the courts, as protected by article 14 (1) of the Covenant. The source recalls that, in paragraph 8 of its

general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee states that this ensures that the parties to the proceedings in question are treated without any discrimination and the principle of "equality of arms". The source submits that, for Mr. Hussein and other prisoners of conscience, release pending trial is almost impossible. This contrasts with the situation of criminal detainees — who may face murder, rape or theft charges — who undergo a regularized legal process that can enable their possible release pending trial. The source notes that many such detainees are granted conditional release;

(h) The authorities violated the right of Mr. Hussein to be free from torture or other cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant; articles 1, 2, 4, 5, 6 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 5 of the Universal Declaration of Human Rights; principle 6 of the Body of Principles; and articles 52 and 55 of the Constitution. The source recalls that, following recent amendments, the domestic legal framework of Egypt allows solitary confinement for up to six months, although that practice violates the country's international human rights obligations. According to the source, by holding Mr. Hussein in prolonged solitary confinement (89 days), the authorities subjected him to cruel, inhuman and degrading treatment that may amount to torture. The conditions in which Mr. Hussein was detained during those 89 days were reportedly extremely harsh and caused him severe psychological and physical stress. At the date of submission of the present communication, the source reports that Mr. Hussein has still not been able to see a doctor and has not received any medication. Moreover, the source claims that Mr. Hussein was forced to record his three "confessions" under duress. The source concludes that, during his initial arrest and throughout his time at the Tora Prison, including in prolonged solitary confinement, Mr. Hussein has been subjected to physical and mental abuse.

Category V

39. Finally, the source claims that the arrest and detention of Mr. Hussein is a manifestation of the discrimination currently being perpetrated against him by the authorities in the light of his protected status as a journalist, in violation of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. Thus, the source submits that the detention of Mr. Hussein is arbitrary under category V.

Response from the Government

40. On 13 June 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure, requesting the Government to provide detailed information by 14 August 2017 about the current situation of Mr. Hussein and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying his continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with the international norms on detention. Moreover, the Working Group called upon the Government to ensure Mr. Hussein's physical and mental integrity.

41. In its response dated 8 August 2017, the Government provided the information below.

42. The Government reaffirms that all detainees in its prisons were persons who had been convicted by a court or placed in detention by a judicial order. The Government asserts that the detainees enjoyed rights and safeguards, reflecting international standards, such as the right to contact and meet in private the lawyer; the right of visitation and communication; the right to health care; the right to adequate standard of living; and the prohibition of cruel, inhuman or degrading treatment.

43. The Government notes with regard to the right to life and liberty and security of person that it respected all the ratified international treaties and ensured that the national legal framework was in accordance with those conventions and its provisions, specifically articles 6 and 9 of the Covenant. According to the Government, any violation of those rights was considered a serious offense resulting in penal sanctions against the perpetrators. The national legislation took into account the international standards on the criminal justice and fair trial as enshrined in the provisions of the Constitution and the ratified international treaties.

44. According to the Government, Mr. Hussein was being detained in Cairo Prison under national security case No. 1152 (2016) for his membership of an illegal organization, for having defamed Egyptian State institutions, notably the Armed Forces, by producing a film for the Qatari broadcaster Al-Jazeera, and for keeping at his brother's house the equipment and material from the Al-Jazeera office in Cairo that had been the subject of the broadcaster's $150 million damage claim against Egypt brought for arbitration to the International Centre for Settlement of Investment Disputes, under the allegation that it had been looted or confiscated by Egypt during the 2013 protests and coup d'état.

45. The Government claims that Mr. Hussein enjoyed the right to regular visits by his family, stating that he had received 31 visits since his arrest, the last one being on 12 July 2017. His lawyer visited him on 21 February and 19 April 2017.

46. According to a medical examination by a prison doctor, Mr. Hussein did not suffer from any chronic illnesses but did suffer from a dislocation of the left elbow joint he suffered after falling in prison in June 2017. When asked, Mr. Hussein denied suffering from any chronic disease and approved of the good treatment he, like other inmates, received from the prison authorities.

47. The Government states that the Ministry of the Interior included an internal unit mandated to raise awareness on human rights and constitutional safeguards among Ministry staff, including the police force, through seminars and training, and to receive complaints about torture or ill-treatment. Rules and regulations were issued to ensure respectful treatment of prisoners and to prohibit and punish any coercive measures as criminal, civil and administrative offences.

48. The Government maintains that it guaranteed the freedom of opinion and expression for everyone without any censorship or criminalization provided that it was exercised in accordance with articles 65-74 and 211-213 of the 2014 Constitution and Law No. 96 (1996) on regulating journalism and its amendments.

49. The Government concludes that Mr. Hussein's detention was sustained by a court order and that he enjoyed all of his rights enshrined in the Constitution and ratified international treaties. He had committed crimes punishable under the law, and all the measures taken against him were in accordance with the law. There was no legal or factual basis for the allegations in the communication.

Further comments from the source

50. The response from the Government was transmitted to the source for its further comments on 15 August 2017. In its response of 13 November 2017, the source reports that Mr. Hussein remained arbitrarily deprived of his liberty at the notorious Tora Prison in Cairo. His arbitrary detention had lasted more than 300 days and continued to be renewed.

51. According to the source, the Government failed to demonstrate how any of the "guarantees and rights" that supposedly exist within the domestic legal framework were in fact applied in practice with respect to the case of Mr. Hussein, let alone in the country more generally. Specifically, the Government failed to demonstrate how the existence of a "section for human rights" within the Ministry of the Interior ensured that human rights were respected, protected or fulfilled in practice, both in general and in the case of Mr. Hussein.

52. The source states that, despite the Government's general, unsubstantiated assertions, the truth remains that Mr. Hussein's rights with respect to his arbitrary detention have been routinely and continually ignored and violated, including the following:

(a) The authorities failed to provide an arrest warrant to Mr. Hussein upon his arrest;

(b) Mr. Hussein was not told why he was being arrested before he was coerced into recording the false confessions;

(c) To date, despite numerous filings and requests, the Government has failed to provide Mr. Hussein's attorney with access to the full case file, failing even to respond or given reason for this denial and violation of Mr. Hussein's rights under the Constitution and international law;

(d) The courts continue to deny Mr. Hussein and his attorney any meaningful opportunity to appeal his detention;

(e) The Government has failed to bring him promptly before a judge and for over 300 days has failed to try him without undue delay;

(f) Mr. Hussein was held in prolonged solitary confinement from 23 December 2016 to 20 March 2017 (89 days), with only sporadic interaction with the outside world or the ability to leave his cell.

53. According to the source, the Government failed to address the petitioner's evidence and arguments demonstrating that Mr. Hussein had been targeted, mistreated and arbitrarily detained for exercising his fundamental right to freedom of expression and opinion, and his right to freedom of association, as a journalist and an employee of Al-Jazeera. In fact, during the same period that the Government was responding to the Working Group, it was also calling on the Government of Qatar to shut down the Al-Jazeera network. The Office of the United Nations High Commissioner for Human Rights called the move "extraordinary, unprecedented and clearly unreasonable", and "an unacceptable attack on the right to freedom of expression and opinion".[1]

54. The source concludes that Mr. Hussein's arrest and continued detention violate:

(a) The right to be free from arbitrary detention;

(b) The right to freedom of association and expression;

(c) The right to due process, including the right to be brought promptly before a judge, the right to appeal the lawfulness of detention, the right to prepare an adequate defence, the right to be presumed innocent before guilty and the right to be equal before the courts;

(d) The right to dignity and the right to be free from torture and cruel, inhuman or degrading treatment or punishment.

55. The source adds that Mr. Hussein's medical condition, including the physical and psychological well-being, remains of grave concern. On 13 June 2017, Mr. Hussein slipped and broke his elbow inside Tora Prison, where he is being detained arbitrarily. Mr. Hussein did not receive medical attention for his injury for 72 hours. When he was finally allowed to see a State-appointed doctor in the detention facility, the doctor placed Mr. Hussein's arm in a cast. The cast was poorly administered and his wound became infected. Mr. Hussein's attorney filed a request with the warden of the detention facility to allow him to be taken to a private hospital at his own expense.

56. This request was raised again at Mr. Hussein's detention renewal hearing, on 22 June 2017, but went unanswered. On 17 July 2017, Mr. Hussein was taken to a hospital and allowed to undergo x-rays, but was denied the necessary medical procedure to change the poorly administered cast or address the infection of his wound. Subsequently, Mr. Hussein's attorney filed a complaint to the Public Prosecutor on 30 July 2017 regarding the delay in providing Mr. Hussein with the necessary medical treatment. In the complaint, the attorney requested that the Public Prosecutor investigate the delay and inspect the situation with the warden and detention facility. He also reiterated his request that Mr. Hussein be taken to a private hospital to receive immediate medical treatment at his own expense. That request remains unanswered to date. With each day passing, Mr. Hussein risks further permanent damage to his arm, or even its amputation.

Discussion

57. The Working Group thanks the source and the Government for their engagement and for their submissions in relation to Mr. Hussein's detention.

58. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be

[1] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21818&LangID=E.

understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

59. The Working Group recalls that, where it is alleged that a person has not been afforded by a public authority certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.[2]

60. The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3] However, the Working Group reiterates that it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary.[4]

61. The Working Group reiterates that it applies a heightened standard of review in cases where the freedom of expression and opinion is restricted or where human rights defenders are involved.[5] Mr. Hussein's role as a journalist of an international broadcaster whose operation in Egypt has been banned by the Government for broadcasting alleged false news, requires the Working Group to undertake that kind of strict scrutiny.

Category I

62. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I.

63. The Working Group notes that, on 19 December 2016, Mr. Hussein was initially detained at Cairo Airport and questioned for more than 15 hours without access to his lawyer before being released, with his passport confiscated. The Working Group considers that any detention of an individual at a police station — even to perform a brief identity check — amounts to a deprivation of liberty. The Working Group adds that persons deprived of their liberty are entitled to the right to legal assistance at all times, which is inherent in the right to liberty and security of person and the right to a fair and public hearing by a competent, independent and impartial tribunal, as established by law under articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant.[6]

64. The Working Group further observes that the Government has not provided the legal basis for either Mr. Hussein's deprivation of liberty lasting over 15 hours or the confiscation of his passport, which infringes upon his right to freedom of movement in violation of articles 3, 9 and 13 (2) of the Universal Declaration of Human Rights and articles 9 (1) and 12 (2) and (4) of the Covenant.[7]

65. On 22 December 2016, Mr. Hussein was again arrested without a warrant outside his home in Giza. He was held incommunicado for over 12 hours and continues to be held in

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[2] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, para. 55; and opinions No. 59/2016, para. 61; and No. 41/2013, para. 27.

[3] See opinion No. 33/2015, para. 80.

[4] See opinions Nos. 63/2017, para. 45; 59/2016, para. 60; 12/2007, para. 18; 40/2005, para. 22; 10/2002, para. 18.

[5] See opinions Nos. 57/2017, para. 46; 38/2017, para. 95; 62/2012, para. 39; 54/2012, para. 29; 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action especially when there are claims of a pattern of harassment. See opinion No. 39/2012, para. 45. See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, article 9 (3).

[6] See also principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, and principle 18 (3) of the Body of Principles. See articles 6 and 7 of the African Charter on Human and Peoples' Rights and articles 12, 13, 14, 15 and 16 of the Arab Charter on Human Rights.

[7] See also articles 6 and 12 (2) of the African Charter on Human and Peoples' Rights and articles 14 (1) and (2) and 27 of the Arab Charter on Human Rights.

custody to date, awaiting trial. Any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks any legal basis, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant.[8]

66. The failure at the time of arrest to inform Mr. Hussein of the reasons for his arrest and of his rights and to inform him promptly of any charges against him further violated articles 3 and 9 of the Universal Declaration of Human Rights, articles 9 (2) and 14 (3) (a) of the Covenant, principles 10 and 13 of the Body of Principles and article 54 of the Constitution.

67. The Working Group notes with concern that Mr. Hussein's incommunicado detention effectively nullified his right to recognition everywhere as a person before the law, as enshrined under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.[9] It also nullified his right to be brought promptly before a judge or other officer authorized by law to exercise judicial power, as established under article 9 (3) of the Covenant, until his appearance before the Homeland Security Prosecution on 4 January 2017,[10] and his right to challenge the lawfulness of his detention before a court, as established under article 9 (4) of the Covenant.[11]

68. The Working Group further notes that article 134 of the Criminal Procedure Code provides for overly broad and vague grounds for pretrial detention, such as the catch-all "harming national security or the public order". The Working Group notes the Human Rights Committee's recommendation that legislation enabling any police officer to arrest persons without a warrant in a large number of circumstances is to be confined so as to bring it into conformity with article 9 (1) of the Covenant (see CCPR/CO/70/TTO, para. 16). Article 134 of the Criminal Procedure Code does not establish a sufficient legal basis for deprivation of liberty for the purpose of article 9 (1) of the Covenant.

69. Given the above observations, the Working Group determines that no legal basis has been invoked for Mr. Hussein's 15-hour interrogation on 19 December 2016 and his continuous detention from 22 December 2016 including his initial 12-hour incommunicado custody, is in violation of articles 3, 6, 9 and 13 of the Universal Declaration of Human Rights and articles 9, 12 and 16 of the Covenant, falling within category I.

Category II

70. The Working Group recalls that holding and expressing opinions, including those that are not in accordance with official government policy, are protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.[12] The Government must respect, protect and fulfil the right to freedom of opinion and expression even if the rights-holder is not to its liking under the peremptory norms (*jus cogens*) of customary international law.

71. According to the Human Rights Committee, States parties should not prohibit criticism of institutions, such as the army or the administration, and the penalization of a

[8] See also principles 2 and 4 of the Body of Principles. The Working Group also notes that the Government has made no claims that Mr. Hussein's arrest was a case of in flagrante delicto, which is the only permissible exception to the requirement of judicial warrant under article 54 of the Constitution and article 40 of the Criminal Procedure Code. The lack of plausible legal basis for arrest under domestic law constitutes an additional violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant as well as article 6 of the Charter on Human and Peoples' Rights and article 14 (1) of the Arab Charter on Human Rights.

[9] See opinion No. 63/2017, para. 67. See also article 5 of the African Charter on Human and Peoples' Rights and article 22 of the Arab Charter on Human Rights.

[10] See also principle 11 (1) of the Body of Principles; and Human Rights Committee general comment No. 34 (2011) on the freedoms of opinion and expression, para. 33. The Working Group notes that article 54 of the Constitution stipulates a stricter 24-hour limitation.

[11] See also principle 11 (3) of the Body of Principles and article 14 (5) and (6) of the Arab Charter on Human Rights.

[12] See also article 9 of the African Charter on Human and Peoples' Rights and article 32 of the Arab Charter on Human Rights.

media outlet, publisher or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.[13] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb.[14]

72. The Working Group recalls that States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of article 19 (3) of the Covenant, which only permit restrictions upon the freedom of expression that are provided by law and are necessary (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.[15]

73. It is ironic that Mr. Hussein has been accused of and held in custody awaiting trial for the production of the Al-Jazeera documentary entitled "Al-Asaker", which exposed the abuse of conscript soldiers in the armed forces that, in all likelihood, he took no part in. Even if he did, it is unacceptable to charge such a routine report with incitement against State institutions or broadcasting false news with the aim of spreading chaos. Mr. Hussein's detention for his alleged exercise of his right to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant serves no legitimate aim in a democratic society.

74. It also appears that Mr. Hussein has been detained as much for his employment by the banned Al-Jazeera network as for any specific act such as the production of "Al-Asaker". While "associations" for the purpose of the "freedom of association" in article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant[16] usually refer to trade unions, non-governmental organizations or private businesses, it is natural to include international broadcasters such as Al-Jazeera.[17] Furthermore, Mr. Hussein enjoys the right to choose freely to work for Al-Jazeera under article 23 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Economic, Social and Cultural Rights.[18] Mr. Hussein has also been deprived of his liberty for the exercise of those rights.

75. The Working Group is of the opinion that Mr. Hussein's deprivation of liberty is in violation of articles 19, 20 and 23 of the Universal Declaration and articles 19 and 22 of the Covenant and falls within category II.

Category III

76. The Working Group has also considered whether violations of the right to a fair trial and due process suffered by Mr. Hussein were grave enough to give his deprivation of liberty an arbitrary character falling within category III. The Government has failed to dispute a number of serious violations alleged by the source.

77. The Government neither tried Mr. Hussein within a reasonable time nor released him, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant.[19] While the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the

[13] Human Rights Committee, general comment No. 34, paras. 38 and 42. See also 27-2(A) KCCR 700, 2013 Hun-Ga 20, 21 October 2015 (Republic of Korea).

[14] See A/HRC/17/27, para. 37. See also Human Rights Council resolution 12/16, para. 5 (p) (i)).

[15] Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 39.

[16] See also article 10 of the African Charter on Human and Peoples' Rights and article 24 (5) and (6) of the Arab Charter on Human Rights.

[17] See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR commentary (Kehl; Arlington: N.P. Engel, 1993), p. 386.

[18] See also article 15 of the African Charter on Human and Peoples' Rights and article 34 of the Arab Charter on Human Rights.

[19] See also article 7 (1) (d) of the African Charter on Human and Peoples' Rights and article 14 (5) of the Arab Charter on Human Rights.

complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities, the Working Group considers that a delay exceeding six months from the time of arrest to the end of trial must be exceptional and that the burden lies with the Government to prove its legitimacy, necessity and proportionality. In this instance, the Government failed to provide any justification for Mr. Hussein's pretrial detention that has already lasted almost a full year with no sign that his criminal trial will take place soon.

78. Furthermore, the Government did not respect Mr. Hussein's right to legal assistance at all times — which is inherent in the right to liberty and security of person — and his right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant.[20] Mr. Hussein was first allowed to meet with his lawyer briefly in the presence of the prison warden on 19 April 2017, almost 4 months after his arrest on 22 December 2016. The Working Group considers that the delay violated Mr. Hussein's right to be brought promptly before a judge and to challenge the lawfulness of detention before a court without delay, which entails the right to visitation and confidential communication with legal counsel beforehand in order to have adequate time and facilities for the preparation of his defence as in any other judicial process. The Government then inexplicably failed to inform Mr. Hussein's lawyers about the acceptance of the appeal against his third 45-day pretrial detention order, thereby denying him the right to be represented by his legal counsel at the appeal hearing on 16 May 2017. The Working Group emphasizes that the judicial character of the habeas corpus proceedings entitles the petitioner to the due process and fair trial rights provided for in article 14 of the Covenant.

79. The Government further failed to respect Mr. Hussein's presumption of innocence in violation of article 11 (1) of the Universal Declaration of Human Rights, articles 10 (1) and 14 (2) of the Covenant, and principle 36 of the Body of Principles.[21] In broadcasting his coerced confession before his trial — which has yet to even commence — the Government violated Mr. Hussein's right to be presumed innocent and to have his human dignity respected. The Working Group recalls that all public officials have a duty to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.[22] While the presumption of innocence needs to be balanced with the public's right to know in a democratic society, the latter must be proportionate to the former.[23] The near-automatic extension of Mr. Hussein's pretrial detention by courts with no regard for his due process and fair trial rights, and his confinement with convicted felons in Tora prison, are also symptomatic of the violation of the presumption of innocence.

80. Throughout Mr. Hussein's detention and his legal challenges against it, the Government has denied his right to have adequate time and facilities for the preparation of his defence and to communicate with counsel, in violation of article 14 (3) (b) and (d) of the Covenant and principles 17 and 18 of the Body of Principles. Not only were Mr. Hussein's lawyers prevented from meeting his clients until 19 April 2017, but a prison warden was present during their meeting. The right to communicate with counsel requires that the accused be granted prompt access to counsel and that counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[24] Repeated requests to gain access to case files by Mr. Hussein's attorneys also went unanswered. For the purpose of the right to a fair trial, "adequate facilities" must include access to documents and other evidence, and that access

[20] See also articles 6 and 7 of the African Charter on Human and Peoples' Rights and articles 12, 13, 14, 15 and 16 of the Arab Charter on Human Rights.

[21] See also article 96 of the Constitution.

[22] Opinion No. 33/2017, para. 86 (e). See also, Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 30; and *Gridin v. the Russian Federation* (CCPR/C/69/D/770/1997), paras. 3.5 and 8.3.

[23] See Bundesverfassungsgericht judgment, BVerfGE 35, 202–245, 5 June 1973 (Germany) and 26-1(A) KCCR 534, 2012 Hun-Ma 652, 27 March 2014 (Republic of Korea).

[24] See Human Rights Committee general comment No. 32 (2007) on right to equality before courts and tribunals and to fair trial, para. 34.

must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.[25] The right to legal representation applies at all stages of the criminal process and the accused must be informed of that right from the onset of investigation, as implied in articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant and as set out explicitly in principle 17 (1) of the Body of Principles.

81. The Working Group is of the view that Mr. Hussein's right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant, would appear to have been prejudiced. The court's apparent failure to order the prosecution to turn over Mr. Hussein's case files to his lawyers, to enjoin the authorities to end his 89-day solitary confinement and other ill-treatments and to allow reasonable access to his family and attorneys — as well as its perfunctory extension of his pretrial detention periods and inaction in the face of the absence of his counsel at the hearing on 16 May 2017 — raise serious doubts about the fairness of the proceedings.

82. Mr. Hussein's ordeals at the notorious Tora Prison also amounted to cruel, inhuman and degrading treatment, in violation of article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant and Principle 6 of the Body of Principles, in addition to the relevant provisions of the Convention against Torture. With regard to Mr. Hussein's 89-day solitary confinement, the Working Group refers to Rule 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), which stipulates that solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. Rule 44 refers to prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days. The Human Rights Committee has noted that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.[26] The Working Group notes that the authorities have failed to treat Mr. Hussein's broken elbow properly since 13 June 2017, with the growing risk that he might need to have the arm amputated, as well as the rashes, chest pain, shortness of breath and other severe physical and psychological stress that Mr. Hussein has suffered during detention.

83. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give Mr. Hussein's deprivation of liberty an arbitrary character, falling under category III.

Category V

84. The Working Group will now examine whether Mr. Hussein's deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

85. As noted above, it seems improbable that Mr. Hussein was in fact involved in the production of the Al-Jazeera documentary "Al-Asaker". Rather, Mr. Hussein's prolonged detention without trial appears to be part of the Government's widespread crackdown on the independent media and bloggers for political opinion at odds with its own.[27]

86. Al-Jazeera in particular has been targeted by the Government for its alleged false news, as the arrest and detention of its journalists in the past demonstrate.[28] Having expelled Al-Jazeera from the country, the Government is currently contesting its arbitration claims for the alleged destruction of its media business in Egypt, with the arrest and detention of its employees, attacks on its facilities, interference with its transmissions and broadcasts, closure

[25] Ibid., para. 33.

[26] Human Rights Committee, general comment No. 20 (1992) on prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, para. 6.

[27] See https://rsf.org/en/news/egyptian-regime-takes-over-four-independent-media; and www.amnesty.org/en/latest/news/2017/09/egyptian-blogger-among-24-facing-jail-terms-for-insulting-the-judiciary.

[28] See www.amnesty.org/en/latest/news/2015/08/egypt-guilty-verdict-against-al-jazeera-journalists-affront-to-justice.

of its offices, cancellation of the claimant's broadcasting licence and compulsory liquidation of its local branch during and after the 2013 protests and coup d'état.[29]

87. It is difficult for the Working Group not to conclude that discrimination by the Government on the basis of political opinion — or, more precisely, journalistic affiliation to an international broadcaster blacklisted by the Government for its political opinion — that aims at ignoring the equality of human beings is the only plausible explanation for Mr. Hussein's arrest and detention without trial. The Working Group therefore concludes that Mr. Hussein has been arbitrarily deprived of his liberty because of his guilt by association with Al-Jazeera as part of the Government's collective punishment for Al-Jazeera's purported political opinion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and falls within category V.[30]

88. The Working Group also notes that the arrest and detention of Mr. Hussein's two brothers, the raiding of his sister's home without a warrant and the suspension of his close relatives from their positions at the State television station may be considered as collective punishment for their guilt by association with Mr. Hussein, and lacking any legal basis. Not only do such deprivations of liberty and other collective acts of reprisal violate international law that protects individuals from discrimination on the basis of birth and family ties, they also qualify as flagrant violations of the right: (a) to liberty and security of person, as enshrined in articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant; and to freedom from arbitrary or unlawful interference with the family and home, as enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant.

Homeland Security Agency (Qita' Al-Amn al-Watani)

89. The Working Group wishes to express its grave concern about the pattern of arbitrary detention, torture and enforced disappearance perpetrated by the Ministry of the Interior Homeland Security Agency (Qita' Al-Amn al-Watani). The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law may constitute crimes against humanity.[31]

90. The duty to comply with international human rights standards that are peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention, rests on all bodies and representatives of the State, all officials, including judges, prosecutors, police and security officers, and prison officers with relevant responsibilities, and all other natural and legal persons.[32]

91. The Working Group would again welcome the opportunity to conduct a country visit to Egypt, in accordance with the request it made on 25 November 2016, so that it can engage with the Government constructively and offer assistance in addressing its serious concerns relating to the arbitrary deprivation of liberty.[33] The Working Group notes in particular the recent cases considered by the Working Group.[34]

Disposition

92. In the light of the foregoing, the Working Group renders the following opinion:

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[29] See https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/1; and http://investmentpolicyhub.unctad.org/ISDS/Details/700.

[30] See also articles 2 and 3 of the African Charter on Human and Peoples' Rights, and articles 3 and 11 of the Arab Charter on Human Rights.

[31] See article 7 (1) (e) of the Rome Statute of the International Criminal Court. See also opinions Nos. 44/2016, para. 37; 32/2017, para. 40; 33/2017, para. 102; 36/2017, para. 110; 51/2017, para. 57; and 56/2017, para. 72.

[32] See opinions Nos. 22/2014, para. 25; 48/2013, para. 14; 36/2013, paras. 34 and 36; 35/2013, paras. 35 and 37; 34/2013 paras. 33 and 35; 9/2013, para. 40; 60/2012; para. 21; 50/2012, para. 27; and 47/2012, paras. 19 and 22.

[33] See opinion No. 60/2016, para. 27.

[34] See opinion No. 60/2016.

The deprivation of liberty of Mahmoud Hussein Gommaa Ali, being in contravention of articles 2, 3, 5, 6, 7, 9, 10, 11, 12, 13, 19 and 20 of the Universal Declaration of Human Rights and of articles 2, 7, 9, 10, 12, 14, 16, 17, 19, 20 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

93. Consequent upon the opinion rendered, the Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Mr. Hussein without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

94. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hussein immediately and accord him and his family an enforceable right to compensation and other reparations especially the reinstatement of his close relatives to their former positions at the State television station, in accordance with international law.

95. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Follow-up procedure

96. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hussein has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hussein;

(c) Whether an investigation has been conducted into the violation of Mr. Hussein's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Egypt with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

97. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

98. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

99. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[35]

[*Adopted on 22 November 2017*]

[35] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 84/2017 concerning Roberto Antonio Picón Herrera (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 5 September 2017 the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Roberto Antonio Picón Herrera. The Working Group requested the Government to provide a response to the communication with their observations on the case by 6 November 2017. On 3 November 2017, the Government requested an extension to the deadline for providing the information. The request was granted and the Government submitted a response to the communication on 13 November 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion,

economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Roberto Antonio Picón Herrera, a 54-year-old Venezuelan national, is a systems engineer living in Caracas. Since 2011, he has worked for the Mesa de la Unidad Democrática (MUD) party in the area of organization and voting systems. In February 2017, the constituent elements of the party appointed to him to the role of coordinator of the technical support team, one of three secretariats established in the recent restructuring exercise, the others being the political support team and the social support team. He has never campaigned for any political party or worked in the civil service.

5. The source reports that on 22 June 2017, Mr. Picón was visiting a building located in Altamira in the municipality of Chacao, State of Miranda, Caracas. Mr. Picón was meeting with the owner of the building when the Bolivarian National Intelligence Service raided it without showing a warrant. During the raid, Mr. Picón was arbitrarily deprived of his liberty, together with the owner of the building and his domestic employees. When the Intelligence Service officers arrested Mr. Picón and the other individuals, they did not show them a search or arrest warrant issued by a judicial authority.

6. The source states that five days later, a request from the Second National Military Prosecutor's Office and a search warrant supposedly issued by a military judge appeared in the case file. Those documents were not displayed by the Intelligence Service officers at the time the arrests were made. The alleged search warrant was based on an Intelligence Service report which alleged that weapons and uniforms belonging to the Bolivarian National Armed Forces and other items which had been used in "violent demonstrations" in Caracas were being hidden at a residential property in the city.

7. According to the source, the report is based on information from a source referred to only as a "trusted individual". It is unclear whether the information was transmitted by anonymous persons or by some other means. The source submits that there is no link between Mr. Picón and the content of the report, or between him and the aforementioned residential property or the items located in it, which, the source alleges, were placed there by officers from the Intelligence Service. The source highlights that Mr. Picón's name does not even appear in the report.

8. The source adds that the alleged court order authorizing the raid lists the names of only 18 of the 19 officers who carried it out. Indeed, the records completed by the officers in connection with the raid and the registers of the collection and transfer of evidence contain the name of an additional officer who was not on the list of those authorized to carry out the raid. The source maintains that this implies that the team which carried out the raid included an officer who was not authorized to be there, and that the unauthorized officer collected evidence and submitted it to the military prosecutor.

9. Furthermore, the source argues that this unauthorized officer submitted evidence to the military prosecutor that, according to the record of the search, was not collected at the property. The source explains that this evidence supposedly forms the basis of the precautionary measure of pretrial detention subsequently applied to Mr. Picón and is currently being used by the military prosecution service to underpin a possible charge against him.

10. The source reports that on 25 June 2017, three days after Mr. Picón's arrest, the President of the Republic made public statements, which were broadcast on national television, indicating that Mr. Picón had been arrested on suspicion of sabotaging the election due to be held on 30 July 2017. The source emphasizes that Mr. Picón has not been charged with cyber-related offences and that, during the raid, no equipment or evidence was recovered that could support that conclusion.

11. The source reports that Mr. Picón appeared before the military courts on 26 June 2017, outside the 48-hour time frame established in the Constitution and in law within which arrested persons must be brought before a judge.[1]

12. The source emphasizes that between 22 June 2017, the date of Mr. Picón's arrest, and his court appearance: (a) there was no official information about where he was being held; (b) he was not allowed to communicate with his family or trusted counsel; and (c) he was not officially informed of the offences for which he was being detained.

13. The hearing was conducted before the Third Procedural Court of the Caracas Military Criminal Circuit by a military judge. Mr. Picón's counsel requested that the judge decline jurisdiction and transfer the case to the ordinary courts, given that Mr. Picón is a civilian and that a military trial would violate his constitutional and human rights to due process, to be heard by a judge duly appointed by law, to an independent and impartial judicial system, and to freedom and integrity of the person.

14. However, the request was disregarded and Mr. Picón was accused of the offences of treason, rebellion and theft of items belonging to the Bolivarian National Armed Forces, as established in the Code of Military Justice (arts. 464 (25), 486 (4) and 570 (1), respectively). Furthermore, Mr. Picón was ordered to be placed in pretrial detention at the headquarters of the Bolivarian National Intelligence Service, a location known as "El Helicoide", in Caracas.

15. The source reports that the decision of the military judge stemmed from the request submitted by the Second National Military Prosecutor's Office, which presented as sole evidence a number of items allegedly found at the residence Mr. Picón had been visiting: (a) electronic equipment, the contents and ownership of which are unknown; (b) an alleged fragmentation grenade, which has not been authenticated; and (c) an anonymous document dated 2003, the content of which is unrelated to the offences of which Mr. Picón is accused.

16. On 10 August 2017, the Military Prosecutor's Office charged Mr. Picón with the military offences that had been listed against him during the initial hearing.

17. The source also notes that, between the time the military judge ordered his detention and 17 August 2017, Mr. Picón was held incommunicado and was able to communicate with his family only by letter. The only exception was on 1 July 2017, when his wife was allowed to visit him for two hours. Mr. Picón's relatives have attempted to visit him on at least 18 occasions, but have been denied access to him by the Intelligence Service officials holding him in custody.

18. On Thursday, 17 August 2017, after 56 days in detention, Mr. Picón was allowed to receive visits from his family for the first time. The authorities informed his family members that they would be permitted to visit him on Wednesdays and Saturdays.

19. However, according to the source, Mr. Picón continues to be denied visits from his lawyers. The source emphasizes that this constitutes a violation of his right to due process. The situation is worsening as the preliminary hearing approaches, although no specific date for it has yet been set.

20. The source reports that, between 1 and 18 August 2017, Mr. Picón was detained in a public bathroom with another prisoner. A light bulb in the room was permanently on, there was no window or any access to daylight, and he was not permitted to go outside. The source maintains that these conditions constitute a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

21. On the afternoon of 18 August 2017, Mr. Picón was moved to a different cell. He was transferred from the bathroom where he had been held in isolation for 17 days to a small room next to a corridor. In the corridor he is able to have contact with other prisoners and has access to a gym. Since then, he has also been permitted to walk in the corridor for up to two hours per day.

[1] Article 44 of the Constitution and article 373 of the Code of Criminal Procedure.

22. The source highlights that Mr. Picón has not had access to direct sunlight since 26 June 2017 and notes that this is also the case for the vast majority of prisoners in El Helicoide.

23. The source reports that challenges to the decision ordering his pretrial detention were filed in a timely manner. When Mr. Picón was brought before the military judge, requests were made for his arrest to be quashed and for him to be released, and for the judge to declare the case to be beyond his jurisdiction. The requests were dismissed by the judge.

24. In addition, an appeal was filed before the military judge who ordered Mr. Picón's pretrial detention. However, no response has been received.

25. Mr. Picón's counsel has also filed a complaint in connection with the pretrial detention measure. Further complaints have been lodged with the Senior Prosecutor's Office of the Public Prosecution Service since, the source maintains, the arrest and detention of Mr. Picón constitute offences under Venezuelan law. According to the source, the Public Prosecution Service launched an investigation but it has not brought to an end the situation in which Mr. Picón finds himself, nor has it named anyone as potentially responsible for his arrest or detention.

26. The source reports that 16 complaints have been filed with the Ombudsman's Office setting out the details of Mr. Picón's detention and requesting his release. A complaint has also been submitted to Prosecutor's Office No. 127 of the Caracas Metropolitan Area Judicial District in connection with the offences committed against Mr. Picón since his arrest.

27. The source submits that the detention of Mr. Picón falls within four (I, II, III and V) of the five categories identified by the Working Group as constituting arbitrary detention.

28. In connection with category I, the source notes that Mr. Picón was arrested by the Bolivarian National Intelligence Service, which did not have either an arrest warrant for him or a search warrant for the address at which he was located. Mr. Picón was not caught in the act of committing a criminal offence, but was attending a work-related meeting. The source adds that in the Bolivarian Republic of Venezuela, an arrest has no legal basis unless a warrant is obtained or the person is discovered in flagrante delicto. According to the source, the circumstances of Mr. Picón's arrest did not meet either of those criteria, and, even more seriously, the case file was tampered with after he was arrested and a prosecutor's request and a search warrant were added to it.

29. In addition, the authorities are seeking to accuse him of military offences even though the conduct of a civilian cannot correspond to such criminal offences. The charges are based on non-existent evidence that has been used, without an evidentiary review, as grounds for depriving Mr. Picón of his liberty. The offences of which he is accused are of a military nature and have no connection with the alleged facts. It is therefore clearly impossible to invoke any legal basis to justify the deprivation of liberty.

30. In connection with category II, the source notes that Mr. Picón was attending a meeting at the address of a work associate as part of his duties as coordinator of the technical support team for the MUD party. The source maintains that, as a citizen, Mr. Picón freely decided to make available his time and his knowledge of systems engineering in support of the struggle for free and fair elections. Therefore, on 22 June 2017, Mr. Picón was arrested in the course of the legitimate exercise of his right to freedom of political expression (art. 19 of the Universal Declaration of Human Rights and art. 19 of the Covenant) and his right of peaceful assembly (art. 20 of the Universal Declaration of Human Rights and art. 21 of the Covenant) — and as a result of the exercise of those rights.

31. In connection with category III, the source submits that in detaining Mr. Picón, the Bolivarian National Intelligence Service, the Military Prosecutor's Office and the military court have violated the basic rules of the right to a fair trial. Mr. Picón was arrested without being shown a warrant, nor was he caught in the act of committing an offence, and he was not brought before a judge within the 48-hour time frame set forth in the Constitution and in law.

32. In addition, the source notes that:

(a) In Mr. Picón's case, the fundamental safeguards of the right to be heard by a judge duly appointed by law and the independence and impartiality of the judiciary have been violated, since the authorities intend to try him in a military court despite him being a civilian;

(b) His right to presumption of innocence has been violated since the President of the Republic made a public statement, ahead of the initial hearing, about Mr. Picón's general responsibility, clearly influencing public opinion regarding the guilt of the accused;

(c) He has not been allowed access to his lawyer apart from when his counsel attended the initial hearing on 26 June 2017.

33. The source concludes that this case represents a grave example of the use of military courts against civilians without any military elements or connections.

34. In connection with category V, the source states that Mr. Picón's detention constitutes discriminatory treatment by the State towards Venezuelan citizens on grounds of their political opposition to the Government. Mr. Picón is a key player in the MUD party, an organization that brings together all the political parties that oppose the national Government and is therefore the main decision-making forum for the opposition parties.

35. The source notes that this is not an isolated case, but part of the systematic political persecution of opposition leaders. There have been previous serious cases against dissident citizens and political leaders.

36. Mr. Picón's role in the MUD party as technical coordinator for elections and his knowledge and skills in the area of database management have made him a key asset in providing support in the area of electoral processes and information management for political purposes. The source also submits that he was arrested just as the Government had called elections to establish a National Constituent Assembly — a time when Mr. Picón's technical assistance with electoral matters would have been invaluable. Therefore, according to the source, there are solid grounds to assert that Mr. Picón's detention was politically motivated because of his links and activism with the MUD party and that it was intended to send a message to others who, like him, might lend their technical expertise in support of similar organizations.

Response from the Government

37. The Government transmitted its response to the Working Group on 13 November 2017. The response indicated that Mr. Picón, a 54-year-old Venezuelan national, was arrested by the Bolivarian National Intelligence Service on 22 June 2017 and was transferred to detention in El Helicoide. He is accused of treason, rebellion and theft of military property.

38. The Government also reported that on 5 October 2017 the Criminal Appellate Division of the Supreme Court agreed to assume automatic jurisdiction over the case brought against Mr. Picón and his co-defendants and ordered the immediate suspension of any action in the case.

39. On the same date, the Criminal Appellate Division of the Supreme Court forwarded to the President of the Court Martial of the Military Criminal Circuit Court the notice relating to the automatic acquisition of jurisdiction in the criminal proceedings against Mr. Picón and his co-defendants. On 10 October 2017, the Criminal Appellate Division assigned Maikel José Pérez Moreno the task of overseeing the acquisition of jurisdiction over the case (case file No. 2017-301). The Government cited the provisions of article 44 of the Constitution, articles 464, 486 and 570 of the Code of Military Justice and article 234 of the Code of Criminal Procedure.

40. For the Government, the circumstances of the case, as evidenced, fully comply with the guarantees of due process relating to personal freedom set forth in the Covenant.

41. As indicated, the Government concludes that it is clear that the procedures followed by the Bolivarian National Intelligence Service in the arrest of the person in question were

fully in line with the domestic legal framework and the international treaties that the Bolivarian Republic of Venezuela has acceded to and ratified.

Additional comments from the source

42. The source alleges that in its written observations, the Government does not refute in any way the arguments contained in the initial communication, which point to the arbitrary nature of Mr. Picón's detention.

43. The source reiterates that Mr. Picón was arrested by the authorities without being shown a warrant and that he was not caught in the act of committing an offence. He was in fact arrested during a raid on a property that he does not own, without an arrest warrant and without having been caught in flagrante delicto.

44. It further noted that 72 hours after the arrest was made (and outside the legally established 48-hour time frame), the President of the Republic announced Mr. Picón's arrest on national television and publicly accused him of planning cyberattacks on the elections due to be held on 30 July.

45. In the source's view, the pretrial detention of Mr. Picón, which was ordered by a military court, breaches the international obligations of the Bolivarian Republic of Venezuela and violates national constitutional and legal provisions. The source notes that there was no justification for the precautionary measure because of the lack of any incriminating evidence, nor was any information presented in connection with the flight risk or obstruction of justice. The source reiterates the violations of due process, including the periods during which Mr. Picón was not permitted to contact anyone, the initial restrictions on his access to lawyers and the nature of the investigation against him.

Discussion

46. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as to the relevant international legal instruments, in accordance with its working methods.

47. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[2]

48. The parties to this procedure accept that on 22 June 2017, Mr. Picón was arrested by officers of the Bolivarian National Intelligence Service and transferred to El Helicoide.

49. The Working Group wishes to recall that any individuals who are arrested must be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them.[3] The Working Group has noted that every person must be informed not only of the reasons justifying the deprivation of liberty, but also of the judicial avenues available to challenge the arbitrariness and lawfulness of the deprivation of liberty.[4] Moreover, persons deprived of their liberty are entitled to be informed by the authorities, upon apprehension, of their right to legal assistance by counsel of their choice.[5] The Working Group has also noted that "the factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay so as to provide adequate time to prepare the challenge. Disclosure includes a copy of the detention order, access to and a copy of the case file, in addition to the disclosure of any material in the

[2] See A/HRC/19/57, para. 68.

[3] Article 9 (2) of the Covenant.

[4] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), Principle 7, Right to be informed.

[5] Ibid., Principle 9, Assistance by legal counsel and access to legal aid.

possession of the authorities or to which they may gain access relating to the reasons for the deprivation of liberty."[6]

50. Faced with the allegations by the source, the Government has not proved that Mr. Picón was informed of the reasons for his arrest or was shown a warrant ordering his arrest or the raid on the property he was in. In addition, it has not proved that he was promptly informed of the charges against him. While the Government submitted a document dated October 2017 and a list of constitutional laws and criminal procedures, these do not substantiate whether the individual was arrested as part of an investigation or in flagrante delicto. Nor has the Government referenced or submitted any documentation that demonstrates the reason for his arrest. The Working Group considers that it has not received convincing information from the Government regarding the reasons for or the legal basis justifying Mr. Picón's arrest on 22 June 2017, making his detention arbitrary under category I of its methods of work.

51. The Working Group received convincing information from the source, which has not been contradicted by the Government, regarding Mr. Picón's professional duties at the time of his arrest. The Working Group is convinced that Mr. Picón worked as coordinator of the technical support team in the MUD party, with a mandate to ensure free and fair elections.

52. In the light of the fact that the Government has not provided sufficient or convincing information regarding the reasons for Mr. Picón's arrest and the fact that that he was deprived of his liberty in the context of efforts to promote free and fair elections, which are protected under the rights to freedom of expression, assembly and peaceful participation, the Working Group considers the detention of Mr. Picón to be arbitrary under category II of its methods of work, since it was motivated by his exercise of the rights enshrined in articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

53. The Working Group is also convinced that, following his arrest by officers of the Bolivarian National Intelligence Service, Mr. Picón was brought before the military courts, where he will be tried. In the view of the Working Group, the trial of civilians by judges under military command constitutes an irregularity;[7] furthermore, in the Group's experience, military tribunals are used as a means of dealing with political opposition groups, journalists and human rights defenders. The Working Group has indicated in its jurisprudence that the trial of civilians by military courts and the detention of civilians by military authorities are violations of both the Universal Declaration of Human Rights and the Covenant.

54. For the Working Group, one of the greatest attributes of civil judges is their independence. Military judges generally are not independent, since they must obey the orders of their superiors and are appointed by the executive branch; therefore, the separation of powers is not guaranteed. The Working Group has noted that a military court cannot be considered a "competent, independent and impartial tribunal"[8] within the meaning of article 14 (1) of the Covenant.

55. Accordingly, the Working Group finds that military tribunals are competent only in respect of military offences committed by military personnel and are not competent to hear cases in which the defendant or the victim is a civilian. Similarly, the Working Group has noted that the offences of rebellion, sedition or attacks against democratic institutions, when committed by civilians, cannot be tried by military courts.[9]

56. The Working Group, in its opinions, annual reports and other documents in which it has dealt with the issue,[10] has referred to the draft principles governing the administration of justice through military tribunals, Principle No. 4 of which (Jurisdiction of military courts

[6] Ibid., Guideline 5, Right to be informed.
[7] A/HRC/27/48, para. 66.
[8] Ibid., para. 68.
[9] Ibid., para. 69 (d).
[10] See, for example, A/HRC/WGAD/2016/15.

to try civilians) states that "military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."[11]

57. Similarly, the Working Group is convinced that Mr. Picón's right to presumption of innocence, as enshrined in article 14 (2) of the Covenant, was violated, since the President of the Republic publicly accused Mr. Picón of an offence before the judiciary had issued a ruling. Mr. Picón's right to a lawyer of his choosing from the moment of his arrest was also violated, and neither was he afforded sufficient time or the necessary conditions in which to adequately prepare his defence, in violation of article 14 (3) of the Covenant.

58. Accordingly, the Working Group considers that the detention of Mr. Picón is arbitrary under category III of its methods of work, because: (a) he was brought before a military court despite being a civilian; (b) his right to the presumption of innocence was violated; and (c) he was denied access to a lawyer of his choosing and was not afforded either sufficient time or the necessary conditions in which to prepare his defence, which constitute a grave failure to observe international standards relating to the right to a fair trial, as established in articles 9 to 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

59. The Working Group wishes to recall that, under certain circumstances, imprisonment and other forms of severe deprivation of liberty in violation of internationally recognized standards may constitute crimes against humanity.[12]

60. In recent years, the Working Group has repeatedly expressed its views on multiple arbitrary arrests of persons because they belong to the political opposition to the Government or because they have exercised their rights to freedom of opinion, of expression, of association, of assembly or of political participation.[13] In the Working Group's view, it is an attack or systematic practice on the part of the Government to deprive political opponents of their physical freedom, particularly those who are seen as opponents of the regime, in violation of fundamental rules of international law, including the Universal Declaration of Human Rights and the Covenant.

61. On the basis of the information available to it, the Working Group considers that Mr. Picón's detention by the Government is arbitrary under category V, inasmuch as it is based on political opinion as expressed through membership of the MUD party, which is contrary to international law prohibiting discrimination on such grounds and therefore violates the principle of the equality of human beings.

62. Finally, in the light of the recurrent pattern of arbitrary detention identified by international human rights mechanisms in recent years, the Government is urged to consider inviting the Working Group to make a country visit. Such visits are an opportunity for the Working Group to engage in direct dialogue with the Government concerned and

[11] E/CN.4/Sub.2/2005/9.

[12] See opinions Nos. 37/2011, para. 15, 38/2011, para. 16, and 39/2011, para. 17 (Syrian Arab Republic); Nos. 4/2012, para. 26, 47/2012, paras. 19 and 22, 34/2013, paras. 31, 33 and 35, 35/2013, paras. 33, 35 and 37, and 36/2013, paras. 32, 34 and 36 (Democratic People's Republic of Korea); Nos. 38/2012, para. 33, and 48/2013, para. 14 (Sri Lanka); Nos. 22/2014, para. 25, 27/2014, para. 32, and 34/2014, para. 34 (Bahrain); No. 35/2014, para. 19 (Egypt); No. 44/2016, para. 37 (Thailand); and Nos. 32/2017, para. 40, 33/2017, para. 10, and 36/2017, para. 110 (Iraq).

[13] Opinions Nos. 52/2017 (Gilbert Alexander Caro Alfonzo); 37/2017 (Braulio Jatar); 18/2017 (Yon Alexander Goicoechea Lara); 27/2015 (Antonio José Ledezma Díaz); 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonzo Leal Toro, Carlos Pérez and Renzo David Prieto Ramírez); 7/2015 (Rosmit Mantilla); 1/2015 (Vincenzo Scarano Spisso); 51/2014 (Maikel Giovanni Rondón Romero and 316 others); 26/2014 (Leopoldo López); 29/2014 (Juan Carlos Nieto Quintero); 30/2014 (Daniel Omar Ceballos Morales); 47/2013 (Antonio José Rivero González); 56/2012 (César Daniel Camejo Blanco); 28/2012 (Raúl Leonardo Linares); 62/2011 (Sabino Romero Izarra); 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas); 27/2011 (Marcos Michel Siervo Sabarsky); 28/2011 (Miguel Eduardo Osio Zamora); 31/2010 (Santiago Giraldo Florez, Luis Carlos Cossio, Cruz Elba Giraldo Florez, Isabel Giraldo Celedón, Secundino Andrés Cadavid, Dimas Oreyanos Lizcano and Omar Alexander Rey Pérez); and 10/2009 (Eligio Cedeño).

with representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention. The Working Group wishes to recall that, on 15 August 2017, it once again requested that the Government consider the benefits of a visit to the Bolivarian Republic of Venezuela.

63. Lastly, in the light of the allegations made by the source, the Working Group has decided to forward the information to the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, for their information and possible action.

Decision

64. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Roberto Antonio Picón Herrera is arbitrary under categories I, II, III and V of the methods of work, being in contravention of articles 8, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights, as well as articles 2, 9, 14, 19, 21 and 22 of the International Covenant on Civil and Political Rights, to which the State is a party.

65. The Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Picón without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

66. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Picón immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

67. The Working Group, in accordance with paragraph 33 of its methods of work, will forward the present opinion to the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, for their information and possible action.

Follow-up procedure

68. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on follow-up action taken on the recommendations made in this opinion, including on:

(a) Whether Mr. Picón has been released and, if so, on what date;

(b) Whether Mr. Picón has been granted compensation or other reparations;

(c) Whether an investigation has been conducted into the violation of his rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

69. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

70. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of

the progress made in implementing its recommendations, as well as of any failure to take action.

71. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[14]

[*Adopted on 23 November 2017*]

[14] See Human Rights Council resolution 24/7, paras. 3 and 7.